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No. 83-99

In the Supreme Court of the United States

OCTOBER TERM, 1983

THOMAS L. VARKONYI, INDIVIDUALLY AND d/b/a METAL RECYCLING COMPANY, PETITIONER

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, in the circumstances of this case, the court of appeals correctly held that the district court abused its discretion in denying the Secretary of Labor's request for a restitutionary injunction requiring the payment of wages wrongfully withheld under the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 8a-15a) is reported at 703 F.2d 555 (table). The opinion and amended judgment of the district court (Pet. App. 1a-7a, 16a-36a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1983, and a petition for rehearing was denied on April 20, 1983 (First Amended Pet. App.). The petition for a writ of certiorari was filed on July 19, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is engaged in the business of collecting, processing, recycling, and selling scrap materials in El Paso, Texas (Pet. App. 18a). Between 1977 and 1981, he employed citizens and legal residents of the United States on a salaried basis as secretaries, bookkeepers, warehouse foremen, warehousemen, and truck drivers (*ibid.*). Petitioner also employed non-skilled manual laborers, most of whom were illegal aliens from Mexico, to work in his warehouse (*id.* at 19a).[1] Although all of petitioner's employees regularly worked more than 40 hours per week, none of them was paid the premium rate of pay required by the Fair Labor Standards Act (FLSA) for overtime work (Pet. App. 24a-26a). Petitioner also failed, in any year between 1977 and 1981, to pay his manual laborers the statutory minimum wage (*id.* at 23a). Finally, he failed to keep adequate records of the number of hours his employees worked, as required by the Act (*id.* at 26a-27a).

The Secretary of Labor brought this action in the United States District Court for the Western District of Texas pursuant to Section 17 of the FLSA, 29 U.S.C. 217, to enjoin petitioner from violating the minimum wage, overtime, recordkeeping, child labor, and "hot goods" provisions of the Act, and from withholding back wages due some of the employees.[2] Following trial, the district court

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[1]Petitioner housed the illegal aliens in the warehouse basement. Pet. App. 22a. He has been convicted of harboring illegal aliens and assaulting an Immigration and Naturalization Service officer, *United States* v. *Varkonyi*, 645 F.2d 453 (5th Cir. 1981), and of obstruction of justice, *United States* v. *Varkonyi*, 611 F.2d 84 (5th Cir.), cert. denied, 446 U.S. 945 (1980).

[2]29 U.S.C. 217 provides in pertinent part:

> The district courts * * * shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including in the case of violations of section 215(a)(2) of this title the

found that certain identified salaried employees were due $5,652.74 in unpaid overtime compensation and that certain identified manual laborers were due $22,869.80 in unpaid minimum wages and overtime compensation (Pet. App. 27a-28a). Accordingly, the court ordered the Secretary to recover from petitioner $28,522.54 plus prejudgment and postjudgment interest and enjoined petitioner from violating the FLSA in the future (Pet. App. 1a-7a, 35a-36a). The Secretary filed postjudgment motions requesting, *inter alia*, that the form of the back wage judgment be changed from a legal monetary award to an equitable restitutionary injunction as provided in Section 17 of the Act. The district court, without explanation, declined to revise its judgment.

On May 11, 1982, subsequent to the entry of the district court's judgment, petitioner filed a voluntary petition pursuant to Chapter 11 of the Bankruptcy Reform Act, 11 U.S.C. (Supp. V) 101 *et seq.* On March 14, 1983, the bankruptcy judge dismissed the petition on the grounds that petitioner's proposed plan discriminated unfairly against the Department of Labor, petitioner's "admitted purpose in instituting this action was to discharge the claim of the Department of Labor," and petitioner had brought the bankruptcy action in bad faith. App., *infra*, 1a-5a. Petitioner's appeal from the dismissal of his bankruptcy petition is pending.

In the interim, the court of appeals reversed the district court's judgment denying the Secretary's request for a restitutionary injunction. Pet. App. 8a-15a. The court first observed that the purpose of a restitutionary injunction is two-fold: to compensate employees for wages due them and

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restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter * * *.

to correct " 'a continuing offense against the public interest.' " Pet. App. 11a, quoting *Marshall* v. *A & M Consolidated Independent School District*, 605 F.2d 186, 189 (5th Cir. 1979), and *Wirtz* v. *Jones*, 340 F.2d 901, 904 (5th Cir. 1965). While acknowledging (Pet. App. 13a) that restitutionary injunctions under the FLSA "should not issue as a matter of course on a finding of past wages due," the court noted (*id.* at 12a) that the scope of a district court's discretion to deny an injunction is "small." Because the district court failed to offer any valid reason to deny an injunction in this case,[3] the court of appeals ruled (*id.* at 14a) that the district court had "improperly withheld" the appropriate equitable remedy.

ARGUMENT

The decision of the court of appeals represents a routine application of well-settled principles governing the award of restitutionary injunctions under the Fair Labor Standards Act to the particular facts of this case. Moreover, the decision below is clearly correct and does not conflict with any decision of this Court or any other court of appeals. Further review therefore is not warranted.

1. In granting the Secretary's request for a restitutionary injunction, the court of appeals correctly noted that this form of relief serves two legitimate legislative purposes: it compensates employees for the losses they sustained, and it protects the public interest by depriving the violator of his

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[3]The court of appeals rejected petitioner's claim that his voluntary bankruptcy petition precluded issuance of a restitutionary injunction. Pet. App. 14a. The court of appeals stated (*ibid.*) that the bankruptcy petition was not filed until after the district court's decision, and thus it could not have provided a basis for that court's refusal to issue a restitutionary injunction. The court of appeals also observed (*ibid.*) that the Secretary would be unable to enforce its judgment against petitioner while the bankruptcy action was pending. Finally, the court noted (*id.* at 15a) that the bankruptcy proceeding had been dismissed.

unjust enrichment and by preventing him from competing unfairly with employers who comply with the FLSA.[4]

The court of appeals recognized (Pet. App. 13a) that district courts retain some discretion in issuing restitutionary injunctions under Section 17.[5] The court of appeals correctly concluded (Pet. App 12a-13a), however, that, in view of the Act's purposes, once an employer is found to have violated the statute the scope of that discretion is narrow. See, *e.g.*, *Donovan* v. *Grantham*, 690 F.2d 453, 456-457 (5th Cir. 1982); *Donovan* v. *Brown Equipment & Service Tools, Inc.*, 666 F.2d 148, 157 & n.14 (5th Cir. 1982); *Marshall* v. *Chala Enterprises, Inc.*, 645 F.2d 799, 802 (9th Cir. 1981). Cf. *Mitchell* v. *DeMario Jewelry, Inc.*, 361 U.S. 288, 296 (1960) ("because of what we have found to be the statutory purposes there is doubtless little room for the exercise of discretion * * *").[6]

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[4]See, *e.g.*, *Donovan* v. *Grantham*, 690 F.2d 453, 456 (5th Cir. 1982); *Donovan* v. *Brown Equipment & Service Tools, Inc.*, 666 F.2d 148, 156-157 (5th Cir. 1982); *Marshall* v. *Chala Enterprises, Inc.*, 645 F.2d 799, 802-803 (9th Cir. 1981); *Marshall* v. *Van Matre*, 634 F.2d 1115, 1118 (8th Cir. 1980); *Marshall* v. *A & M Consolidated Independent School District*, 605 F.2d 186, 189-190 (5th Cir. 1979); *Hodgson* v. *Wheaton Glass Co.*, 446 F.2d 527, 535 (3d Cir. 1971); *Shultz* v. *Mistletoe Express Service, Inc.*, 434 F.2d 1267, 1272-1273 (10th Cir. 1970); *Wirtz* v. *Malthor, Inc.*, 340 F.2d. 901, 904-905 (9th Cir. 1965).

[5]Petitioner incorrectly suggests (Pet. i, 11, 19) that the court of appeals assumed that the district courts lack discretion to refuse to issue restitutionary injunctions. To the contrary, the court of appeals expressly acknowledged (Pet. App. 13a) that such relief "should not issue as a matter of course on a finding of past wages due" and reviewed the district court's action to determine whether it had abused its discretion in refusing the Secretary's request for a restitutionary injunction.

[6]Petitioner cites eight cases (Pet. 13-14) for the proposition (Pet. 13) that "the Federal Courts have broad discretion to grant or to deny injunctive relief in this area." Petitioner's reliance on these cases is misplaced, however, since each of the cases involved the issuance of prospective, rather than restitutionary, injunctive relief. The two types of injunctions are governed by different standards. See *Donovan* v. *Brown Equipment & Service Tools, Inc.*, *supra*, 666 F.2d at 158.

Here, the district court concluded that petitioner had illegally withheld from his workers $28,522.74 in unpaid minimum wages and overtime compensation.[7] Moreover, the court offered no reason for refusing the equitable remedy authorized by Section 17 of the Act. In these circumstances, the court of appeals correctly held that the district court abused its discretion in denying the Secretary's request for a restitutionary injunction and properly remanded the case for entry of an award of such relief (*id.* at 15a).[8] This ruling is in accord with the overwhelming weight of the case law that has considered the propriety of issuing restitutionary injunctions under Section 17.[9]

2. The only justification petitioner offers (Pet. 18) for the denial of a restitutionary injunction is his asserted bankruptcy. But this defense is inadequate for several reasons.

In the first place, an employer's financial difficulties affect the enforceability of an injunction, not its availability. See *Hodgson* v. *A-1 Ambulance Service, Inc.*, 455

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[7]Petitioner contends (Pet. 14-15) that the court of appeals' holding ignores the statutory requirement that injunctions issue only for "cause shown." But this requirement of Section 17 is plainly satisfied by the restitution due petitioner's employees for the wages illegally withheld from them.

[8]The district court entered a legal judgment for back pay even though Section 17 of the Act, under which this action was brought, grants district courts jurisdiction only to issue injunctive relief, including restitutionary injunctions. Because nothing in Section 17 permits district courts to substitute other remedies for the restitutionary injunction that Congress explicitly chose, the court of appeals acted properly in correcting the form of judgment.

[9]See, *e.g.*, cases cited in note 4, *supra*. The Ninth Circuit's affirmance of the denial of a restitutionary injunction in *Brennan* v. *Saghatelian*, 514 F.2d 619, on denial of motion for reconsideration, *Dunlop* v. *Saghatelian*, 520 F.2d 788 (1975), has since been confined to the "extreme set of facts" involved in that case. *Marshall* v. *Chala Enterprises, Inc.*, *supra*, 645 F.2d at 803 & n.9; *Marshall* v. *Valhalla Inn*, 590 F.2d 306, 308 (9th Cir. 1979).

F.2d 372, 374-375 (8th Cir. 1972); *Hodgson* v. *Hotard*, 436 F.2d 1110 (5th Cir. 1971). In addition, the Bankruptcy Reform Act deals with all "right[s] to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, * * * legal, equitable, secured or unsecured." 11 U.S.C. (Supp. V) 101(4)(A). Hence, if an individual is adjudged "bankrupt" by the bankruptcy court, any enforcement of a restitutionary injunction will be determined by that court. Assuming arguendo, therefore, that petitioner was bankrupt when the Secretary brought this action, the Secretary nevertheless was entitled to obtain an injunction even though he would have had to resort to the bankruptcy system in order to enforce it. Cf. *Nathanson, Trustee in Bankruptcy* v. *NLRB*, 344 U.S. 25 (1952).

Moreover, petitioner had not even claimed to be bankrupt at the time the Secretary brought this action, or even at the time the district court entered judgment. Accordingly, as the court of appeals noted (Pet. App. 14a), petitioner's alleged bankruptcy could not have been the basis for the district court's decision. Finally, even after the district court's judgment was entered, petitioner never established that he actually was bankrupt. Indeed, the bankruptcy court dismissed petitioner's voluntary petition, stating that he had brought the action in bad faith. App., *infra*, 4a. The court of appeals therefore acted properly in remanding for issuance of an injunction rather than accepting petitioner's unsubstantiated allegations of bankruptcy.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1983

DOJ-1983-08

APPENDIX

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

THOMAS VARKONYI, d/b/a METAL RECYCLING COMPANY and UNIQUE PRODUCTS INTERNATIONAL,	)	Civil Action File
	)	No. 11-3-82-00202
Debtor.	)	

ORDER OF DISMISSAL

In accordance with the Findings of Fact and Conclusions of Law signed and entered in this action on the 14th day of March, 1983,

IT IS ORDERED, ADJUDGED AND DECREED that the above named and numbered cause be and it hereby is dismissed with prejudice with costs to be taxed against the debtor for which execution may lie.

Signed and entered this 14th day of March, 1983.

/s/ Bert W. Thompson

BERT W. THOMPSON
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

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Debtor.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes before the Court pursuant to a motion filed by the Secretary of Labor, United States Department of Labor, to dismiss the above named and numbered cause.

Said motion to dismiss came on for hearing before the Court on the 23rd day of February, 1981 following notice to creditors and other parties in interest. Having considered the pleadings, the exhibits, the oral testimony of witnesses and the statements of counsel, and being fully advised in the premises of this matter, the Court makes and issues its findings of fact and conclusions of law separately stated as follows:

FINDINGS OF FACT

1. Thomas L. Varkonyi, an individual owning and operating a business with a trade style of Metal Recycling Company, whose principal place of business is located at 2505-2511 Texas Avenue, El Paso, Texas, filed with the Court on May 11, 1982, a *Debtor's Voluntary Petition* pursuant to Chapter Eleven (11) of the Bankruptcy Reform Act.

2. Raymond J. Donovan, Secretary of Labor, United States Department of Labor, is a creditor of the debtor, and is holder of a United States District Court Judgment entered on December 1, 1981 and filed December 4, 1981 awarding him the sum of $28,522.54 plus pre and post-judgment interest, plus costs of the action under which the Judgment arose.

3. The aforestated amount of recovery awarded to the Department of Labor represents a recovery of past due wages earned by Mr. Varkonyi's employees for work performed for the period July 1, 1977 to July 26, 1981 but withheld by Mr. Varkonyi from his employees in violation of §§ 6, 7 and 15(a)(2) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201, *et seq.*

4. The debtor has filed an Original Proposed Plan, a First Amended Proposed Plan, and a Second Amended Proposed Plan to date all of which make no provision for payment to the Department of Labor of any kind.

5. Mr Varkonyi has continued to pay each of the secured and unsecured creditors named in Class One, Class Two, Class Three and Class Four of his Second Amended Proposed Plan payment in full of every debt as it matures.

6. Mr. Varkonyi has approached each of the secured and unsecured creditors named in Class One, Class Two, Class Three and Class Four of his Second Amended Proposed Plan and has assured them continued payment in accordance with the original terms of his agreement with each.

7. No creditor named in Class Five or Class Six of the debtor's Second Amended Proposed Plan, other than the Department of Labor, has a claim reduced to Judgment.

8. The Department of Labor's claim represents the only non-contested claim for which the debtor has not made provisions for payment.

9. The debtor's proposed plan discriminates unfairly and is not fair and equitable with respect to the claim of the Department of Labor.

10. The debtor's admitted purpose in instituting this action was to discharge the claim of the Department of Labor.

11. The debtor has not brought this action in good faith.

12. The debtor has filed only the minimal amount of material possible to invoke the jurisdiction of this court and has engaged in unreasonable delays in the pursuit of this action to the prejudice of the Department of Labor.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and over the subject matter of this action.

2. The debtor's Second Amended Proposed Plan does not make clear that the interests of the creditors identified in Class Four of said plan would not be impaired as is required by 11 U.S.C. § 1123(a)(2).

3. The debtor has made payments and promised payment to certain creditors in connection with this case and in connection with the Second Amended Proposed Plan which were not disclosed to the Court in violation of 11 U.S.C. § 1129(4)(A).

4. The debtor's Second Amended Proposed Plan does not meet the requirements of 11 U.S.C. § 1129 in that it discriminates unfairly and is not fair and equitable with respect to the claim of the Department of Labor.

5. There has been an unreasonable delay by the debtor that has prejudiced the Department of Labor within the meaning of 11 U.S.C. § 1112(b)(3).

6. The Department of Labor is entitled to an Order granting its motion to dismiss and dismissing this action with prejudice with costs to be taxed against the debtor for which execution may lie.

/s/ Bert W. Thompson

BERT W. THOMPSON
United States Bankruptcy Judge

SOL Case No. 18164